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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN E. BORST,

Plaintiff and Appellant,

v.

THE CITY OF EL PASO DE ROBLES,

Defendant and Respondent.

2d Civil No. B238167
(Super. Ct. No. CV 118178)
(San Luis Obispo County)

John E. Borst filed an action against the City of El Paso de Robles (City). He contended that an ordinance enacted by City was invalid because it had not been approved by the voters as required by Proposition 218. Borst appeals from the judgment of dismissal entered after the trial court sustained City's demurrer without leave to amend. We affirm.

Background

In May 2010 appellant and four other persons brought an action against City to invalidate Ordinance No. 967 N.S. (Ordinance 967). The action, hereafter referred to as *Borst I*, took the form of a combined petition for a writ of mandate and complaint for declaratory relief. Ordinance 967 amended the Municipal Code to establish a uniform consumption-based water fee structure. Plaintiffs contended that the

fees constituted a special tax imposed without voter approval in violation of Proposition 218.

"Proposition 218, the 'Right to Vote on Taxes Act,' was adopted by the voters in November 1996. The stated purpose of Proposition 218 was to 'protect [] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' [Citation.] The proposition generally provides for taxpayer approval for the adoption, extension or increase of taxes or assessments. Proposition 218 added [to the California Constitution] article XIII C involving general and special taxes and article XIII D involving assessments." (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 235.)

Section 6, subdivision (c), article XIII D of the California Constitution provides that a "property related fee" for water may be imposed without voter approval. In *Borst I* plaintiffs maintained that City had erroneously concluded that the new water fee structure did not need voter approval because it qualified as a property related fee.

Following a hearing, judgment was entered in *Borst I*. The trial court concluded "that the Water Charges" in Ordinance 967 "were 'property-related fees,' not special taxes." On the other hand, the court also concluded that City's notice to affected property owners and tenants had violated California Constitution, article XIII D, section 6, subdivision (a)(1) because City "did not provide adequate information concerning the basis upon which the amount of the proposed fee or charge was calculated and/or the reason for the fee or charge." The court denied plaintiffs' request for relief to the extent they had sought to invalidate Ordinance 967 on the ground that it imposed a special tax rather than a property related fee. The court granted their request for relief "to the extent that the City's notice regarding the public hearing on the Water Charges in Ordinance [967] did not comply with . . . Article XIII D, section [6, subdivision] (a)(1)." The court ordered City to "either repeal Ordinance [967] or reconsider Ordinance [967] and the Water Charges imposed therein only after it provides notice in accordance with . . . Article XIII D, section [6, subdivision] (a)(1) . . . ." Plaintiffs did not appeal.

City subsequently enacted Ordinance No. 973 N.S. (Ordinance 973) after providing the required notice to affected property owners and tenants.[1] City noted that it was "maintain[ing] the same uniform water rates set forth in Ordinance No. 967, with the only change being the date on which the new rates would take effect . . . ."

Appellant, proceeding in propria persona, brought the instant action (*Borst II*) against City to invalidate Ordinance 973. Like *Borst I*, *Borst II* also took the form of a combined petition for a writ of mandate and complaint for declaratory relief. Appellant claimed that City had enacted Ordinance 973 in violation of Proposition 218 because the ordinance levied a special tax without voter approval.

City demurred to the petition and complaint on the ground that they were barred by the doctrines of res judicata and collateral estoppel. The trial court sustained the demurrer without leave to amend. Appellant moved for reconsideration and sought permission to file an amended petition and complaint. The trial court denied the motion for reconsideration. A judgment of dismissal was subsequently entered.

Standard of Review

"We employ two separate standards of review when considering a trial court order sustaining a demurrer without leave to amend. [Citation.] We first review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory. [Citation.] ' " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]" ' [Citation.] 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] . . . [¶] If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. [Citation.] It is an abuse of discretion for the trial court to sustain a demurrer

[1] In his opening brief, appellant acknowledges that "Ordinance 973 was enacted following a mailed, newly written Notice to City water customers as mandated by the trial court in [*Borst I*] . . . ."

without leave to amend if the plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment. [Citation.]" (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 800-801.)

Res Judicata

" 'As generally understood, "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates' " in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" [Citation.]' " (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 797.)

"Under the doctrine of [the primary aspect of] res judicata [claim preclusion], 'all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.' [Citation.] [¶] A claim raised in a second suit is 'based on the same cause of action' as one asserted in a prior action if they are both premised on the same 'primary right.' [Citation.] 'The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. [Citation.]' " (*In re Estate of Dito*, *supra*, 198 Cal.App.4th at p. 801.) "[T]he violation of a single primary right gives rise to but a single cause of action. [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.)

Discussion

Appellant contends that "[t]he res judicata doctrine does not apply herein because the issues involved are pure questions of law" concerning the application of Proposition 218. Appellant fails to distinguish between the primary aspect of res judicata (claim preclusion) and collateral estoppel (issue preclusion). "[I]t is debatable whether the doctrine of collateral estoppel . . . applies to pure questions of law. [Citations.]" (*In*

re Bush (2008) 161 Cal.App.4th 133, 146, fn. 6.) We need not resolve this debate because, as a matter of law, appellant's petition and complaint in *Borst II* were barred by the primary aspect of res judicata (claim preclusion).

For purposes of res judicata, appellant's causes of action in *Borst I* and *Borst II* were the same because they were premised on the same primary right: the right to not be subject to special taxes imposed on water consumption by City ordinances that had not been approved by the voters as required by Proposition 218. In *Borst I* the trial court determined that the fees imposed by Ordinance 967 were property related fees that did not require voter approval. In *Borst II* appellant sought to invalidate as special taxes the identical consumption-based water fees imposed by Ordinance 973.

We reject appellant's argument that each new ordinance "is the origin of a new charge fixing procedure, new charge liability, and . . . a new cause of action.' " (Quoting from *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1300.) Ordinance 967 and Ordinance 973 required the same charge-fixing procedure and imposed the same charge liability.

Appellant contends that the res judicata doctrine does not apply here because the situation was altered by a change in the law that occurred between the enactment of Ordinance 967 and the enactment of Ordinance 973. This change allegedly resulted from the passage of Proposition 26 in November 2010.

Appellant's contention is without merit. Proposition 26 added subdivision (e) to article XIII C, section 1 of the California Constitution. Subdivision (e) expanded the definition of "tax" to include, with specified exceptions, "any levy, charge, or exaction of any kind imposed by a local government . . . ." (Cal. Const., art. XIII C, § 1, subd. (e).) One of the exceptions is "property-related fees imposed in accordance with the provisions of Article XIII D." (*Id*., subd. (e)(7).) Under Proposition 26, therefore, voter approval is still not required for property-related water fees.

Appellant notes that the courts have "recognized that public policy considerations may warrant an exception to the claim preclusion aspect of res judicata, at least where the issue is a question of law rather than of fact. [Citations.]" (*People v.*

Barragan (2004) 32 Cal.4th 236, 256.) But appellant does not identify any policy considerations that would warrant an exception here.

Accordingly, the trial court did not err in sustaining City's demurrer. Nor did the court abuse its discretion in refusing to permit appellant to file an amended complaint.

Disposition

The judgment is affirmed. City shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

John E. Borst, in pro. per., for Plaintiff and Appellant.

Best Best & Krieger, Iris P. Yang, Kimberly E. Hood and Irene S. Zurko for Defendant and Respondent.